IN THE

SUPREME COURT OF THE UNITED STATES

MAR 7 1969
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1968

No. 904

MAYHUE'S SUPER LIQUOR STORES, INC.,
Appellant,

vs.

DON MEIKLEJOHN, as Director,
Beverage Department, State of Florida, et al.,
Appellees.

Appeal Pursuant to § 1253, Title 28, United States Code, from Three Judge Panel, United States District Court for the Southern District of Florida

---

Appellees' Motion to Dismiss the Appeal or Affirm the Judgment Below Pursuant to Supreme Court Rule 16

and

BRIEF IN SUPPORT THEREOF

T. T. TURNBULL
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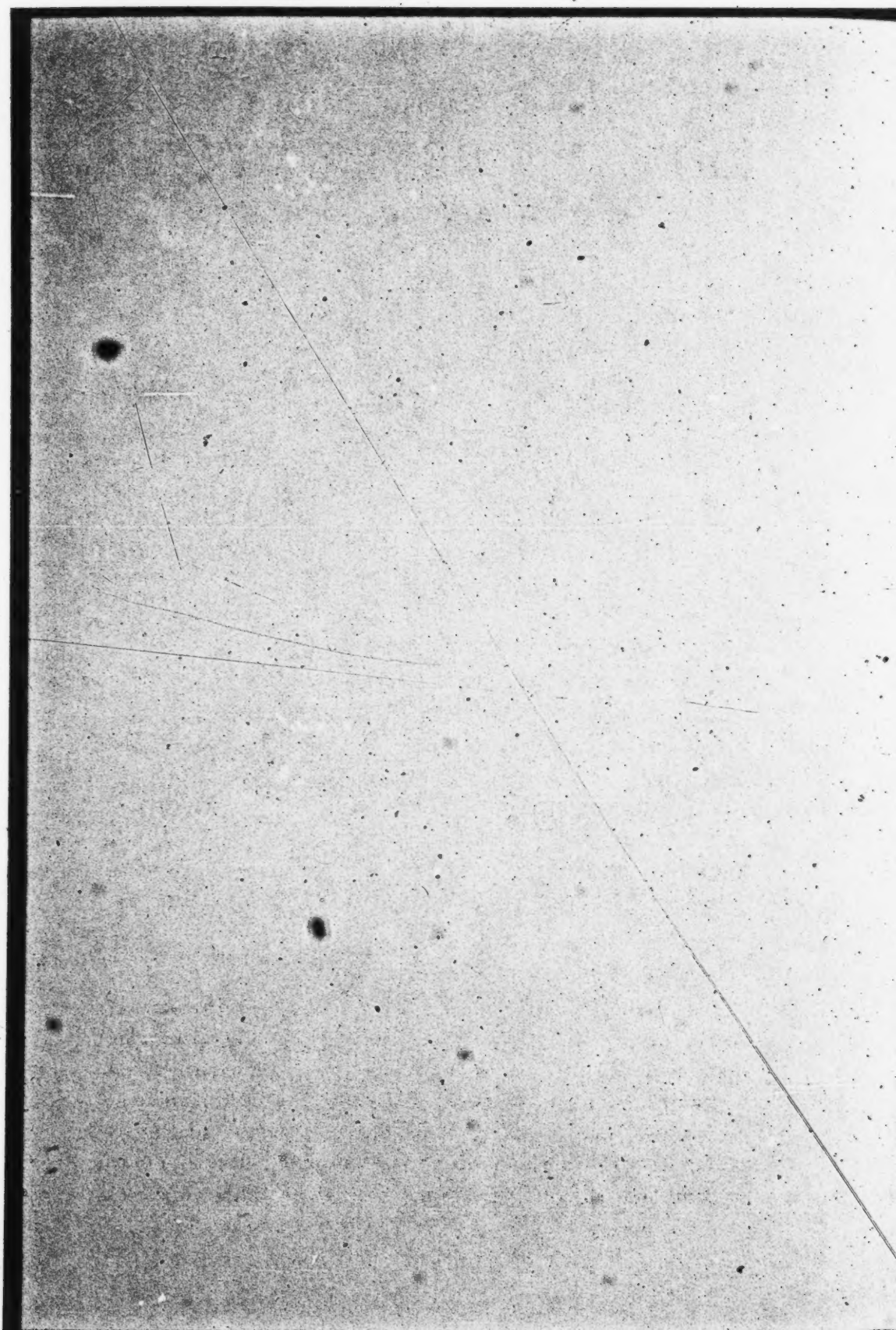

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Defendant-Appellee, DON MEIKLEJOHN, as Director of the Beverage Department of the State of Florida, moves to dismiss the Appeal herein pursuant to Supreme Court Rule 16 on the ground that the appeal is not within the jurisdiction of this Court and in the alternative moves to affirm the Order of Dismissal below upon the ground that it is manifest that the three-judge court was

correct in dismissing the cause for lack of a substantial federal question so as not to need further argument.

This motion is supported by a brief, filed and served with the motion.

T. T. TURNBULL
Assistant Attorney General
State of Florida
State Capitol Building
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W. R. Phillips
Attorney for Florida State Beverage Department
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Tallahassee, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion was mailed to PEARSON & JOSEFSBERG, 733 City National Bank Building, Miami, Florida 33130, ALAN R. SCHWARTZ, 66 West Flagler Street, Miami, Florida, Attorneys for Appellant, FRATES, FAY, FLOYD, & PEARSON, Attorneys for Distilled Spirits Wholesalers, Inc., 12th Floor Concord Building, Miami, Florida, and to SCOTT, McCARTHY, STEEL, HECTOR & DAVIS, Attorneys for Beer Industry of Florida, 14th Floor First National Bank Building, Miami, Florida 33131 this 6th day of March, 1969.

T. T. TURNBULL
Assistant Attorney General
State of Florida
State Capitol Building
Tallahassee, Florida

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INDEX

STATEMENT OF THE CASE 2

ARGUMENT — MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION 3

ARGUMENT — MOTION TO AFFIRM ORDER OF DISMISSAL 6

CONCLUSION 9

CERTIFICATE OF SERVICE 10

TABLE OF AUTHORITIES

	Page
Arizona Publishing Co. v. O'Neil, et al., 22 F.Supp. 117 (D.C. Ariz. 1938) aff'd 304 U.S. 543, 82 L.Ed. 1518, 58 S.Ct. 950	8
Brotherhood of Locomotive Engineers, et al. v. Chicago, Rock Island & Pacific Railroad Co., et al., 382 U.S. 423, 15 L.Ed.2d 501, 86 S.Ct. 594 (1965)	3
Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 4 L.Ed.2d 568, 80 S.Ct. 568 (1960)	3
Fowler v. Harris, Md. App. 1938, 200 A. 825.	8
Jacobs v. Tawes, 250 F.2d 611 (4 Cir. 1957).	5
Moody v. Flowers, 387 U.S. 97, 18 L.Ed.2d 643, 87 S.Ct. 1544 (1967)	3
Morey v. Doud, 354 U.S. 457, 1 L.Ed.2d 1485, 77 S.Ct. 1344 (1957)	7
Overstreet v. Lee, 1st D.C.A. 1963, 152 So.2d 201	8
Pickerill v. Schott, Fla. 1951, 55 So.2d 716	8
Smith v. Cahoon, 283 U.S. 553 (1930)	7
Stuart v. Wilson, 282 F.2d 539 (5 Cir. 1960)	4
Swift & Co. v. Wickham, 382 U.S. 111, 15 L.Ed.2d 194, 86 S.Ct. 258 (1965)	3

AUTHORITIES CITED (Cont'd)

Tom and Jerry Inc. v. Nebraska Liquor Control Commission, Neb. 1968, 183 Neb. 410, 160 N.W.2d 232 8

United States v. Georgia Public Service Commission, 371 U.S. 285, 9 L.Ed.2d 317, 83 S.Ct. 397 (1962) 3

STATUTES

28 U.S.C. § 1253, U.S.C.A. 4

28 U.S.C. § 1291, U.S.C.A. 4

28 U.S.C. § 2281, U.S.C.A. 4

28 U.S.C. § 2284(1), U.S.C.A. 5

F.S. § 561.21, F.S.A. 2

F.S. § 561.42, F.S.A. 2

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Brief in Support of Appellees' Motion to Dismiss the Appeal or Affirm the Judgment Below Pursuant to Supreme Court Rule 16

STATEMENT OF THE CASE

The Plaintiff-Appellant, MAYHUE'S SUPER LIQUOR STORES, INC., will be referred to as Mayhue's or Plaintiff. The Defendant-Appellee, DON MEIKLEJOHN,

as Director of the Beverage Department of the State of Florida, will be referred to as the Director.

Mayhue's is a retail vendor of liquor, wine and beer. It instituted this action against the Director claiming that Sections 561.42 and 561.21 of the Florida Statutes are unconstitutional and seeking a temporary and permanent injunction against the Director from enforcing these laws. The sections under attack are generally known as the "Tied House Evil" Statutes, which prohibit a manufacturer or distributor of alcoholic beverages from having a financial interest in the business of a retailer of alcoholic beverages and forbid manufacturers or distributors from assisting retailers by any gift or loan of money or otherwise.

Mayhue's sought and obtained an order from the United States Court of Appeals from the Fifth Circuit empaneling a three-judge District Court to hear argument on Motions to Dismiss which had been filed by the Director and on behalf of Distilled Spirits Wholesalers, Inc. and Beer Industry of Florida as amicus curiae.

The case was dismissed by the three-judge court on the grounds that the allegations of the Complaint affirmatively showed that there was no substantial federal question presented for determination.

Mayhue's took simultaneous appeals to this Court and to the Court of Appeals for the Fifth Circuit. Proceedings in the latter have been stayed pending the outcome of this appeal.

I. MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

The jurisdiction of this Court on appeal is invoked pursuant to Title 28, U.S.C. § 1253. The threshhold question is therefore whether this Court rather than the Court of Appeals for the Fifth Circuit has jurisdiction to review the determination of the three-judge District Court below.

In recent years, this Court has frequently dealt with the question of its jurisdiction of a direct appeal under § 1253.

Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 4 L.Ed.2d 568, 80 S.Ct. 568 (1960).

United States v. Georgia Public Service Commission, 371 U.S. 285, 9 L.Ed.2d 317, 83 S.Ct. 397 (1962).

Swift & Co. v. Wickham, 382 U.S. 111, 15 L.Ed.2d 194, 86 S.Ct. 258 (1965).

Brotherhood of Locomotive Engineers, et al. v. Chicago, Rock Island & Pacific Railroad Co., et al., 382 U.S. 423, 15 L.Ed.2d 501, 86 S.Ct. 594 (1965).

Moody v. Flowers, 387 U.S. 97, 18 L.Ed.2d 643, 87 S.Ct. 1544 (1967).

These cases make clear the following principles.

The question whether the Court has jurisdiction of this appeal depends upon whether this action was one re-

quired by § 2281 to be heard by a three-judge District Court. The question whether this case was one requiring three judges depends upon whether the Plaintiff's claim presented a substantial federal question. If Plaintiff's claim did not present a substantial constitutional issue, there was no basis for the convocation of a three-judge court. If Plaintiff's claim presented a substantial federal question, a three-judge court was required to adjudicate that question.

As stated by this Court in **Swift & Co. v. Wickham, supra,** it has long been held that no three-judge court is called for when the alleged constitutional claim is unsubstantial. In this case, the three judges held that Plaintiff's alleged constitutional claim was insubstantial and accordingly, dismissed Plaintiff's Complaint. The determination having been made that there was no substantial federal question before the three judges, there was no justification for the three-judge court and hence, there is no justification for direct appeal to this Court.

Moreover, it should be noted that the order appealed from is not "an order granting or denying . . . an interlocutory or permanent injunction." 28 U.S.C., § 1253. It is clear that the judgment of a one-judge District Court dismissing an action to restrain enforcement of a state law because of the lack of a substantial federal question warranting the exercise of jurisdiction is not an order which would support a direct appeal to the United States Supreme Court under Title 28, U.S.C., §,1253. It is merely a final decision which will support an appeal to the Court of Appeals under 28 U.S.C., § 1291. **Stuart v. Wilson,** 282 F.2d 539 (5 Cir. 1960).

It is also clear that a three-judge court is not a different court from the District Court. It is the District Court composed of two additional judges sitting with the single District Judge before whom the application for injunction has been made. 28 U.S.C., § 2284(1); **Jacobs v. Tawes**, 250 F.2d 611 (4 Cir. 1957). Although this Court has not expressly considered this point in prior decisions, it is respectfully submitted that the language of § 1253 concerning the type of order entered should control whether a direct appeal under Title 28, U.S.C., § 1253 is proper.

> As stated in **Swift & Co. v. Wickham, supra,**:
> "[6,7] Section 2281 was designed to provide a more responsible forum for the litigation of suits which, if successful, would render void state statutes embodying important state policies. The statute provides for notification to the State of a pending suit, 28 USC § 2284(2) (1964 ed), thus preventing ex parte injunctions common previously. It provides for three judges, one of whom must be a circuit judge, 28 USC § 2284(1) (1964 ed), to allow a more authoritative determination and less opportunity for individual predilection in sensitive and politically emotional areas. **It authorizes direct review by this Court, 28 USC § 1253, as a means of accelerating a final determination on the merits**; an important criticism of the pre-1910 procedure was directed at the length of time required to appeal through the circuit courts to the Supreme Court, and the consequent disruption of state tax and regulatory programs caused by

the outstanding injunction." (Emphasis Added). 15 L.Ed.2d at pages 200 and 201.

Contrary to the inference in Appellant's Brief on Jurisdictional Statement, the three-judge panel did not hold argument on nor did it purport to dismiss the Complaint on the merits. It simply found no basis for federal jurisdiction. Consequently, there is no reason for an accelerated determination on the merits by direct appeal.

II. MOTION TO AFFIRM THE ORDER OF DISMISSSAL

In argument before the three-judge court (R.81-157), counsel for Mayhue's conceded that its claim was based solely upon the equal protection clause of the United States Constitution (R.137).

Counsel for Mayhue's also conceded that as a retail vendor of liquor, wine and beer it was treated the same by the legislation under attack as everyone else within the class (R.137). It is the position of Mayhue's that it should be treated the same as retail vendors in other industries, i.e., retail vendors of clothing, food, and guns, etc., (R.137). The argument of Mayhue's was condensed by the Court below as the contention that it is "unreasonable to classify beer and wine retailers in a way in which they cannot obtain the credit as compared with a shoe store retailer or a clothing retailer, or anyone else who can go out and get credit." (R.139). In addition to this position, Mayhue's contends that it is an unreasonable classification to place different credit restrictions upon a retail vendor as opposed to the manufacturer, wholesaler or distributor in the liquor business (R.140). It has

been conceded by Mayhue's that there is no authority to support their position (Jurisdictional Statement, p. 6) and it was so recognized by the Court below (R.142).

In its brief on Jurisdictional Statement, Mayhue's relies upon **Smith v. Cahoon,** 283 U.S. 553 (1930) and **Morey v. Doud,** 354 U.S. 457, IL.Ed.2d 1485, 77 S.Ct. 1344 (1957). Each of the cited cases is inapposite. In **Morey,** the court held that there had been a violation of the equal protection clause, wherein the Illinois Community Currency Exchanges Act excepted money orders of the American Express Company from the requirement that any firm selling or issuing money orders in the State of Illinois must secure a license and submit to state regulations. In other words, an obvious exception was made as to the American Express Company as opposed to all other firms engaged in the selling or issuing of money orders. In the present case as previously noted, Mayhue's is treated exactly the same as all other retail liquor vendors. The same distinction is noted in **Cahoon** wherein the court struck down a Florida statute imposing various regulations and restrictions on carriers without regard to whether said carriers were purely private carriers or common carriers. The court reasoned that it was lawful for the State of Florida to regulate all common carriers in the same manner, but that the Florida legislature could not indiscriminately expand this regulation to apply to a private carrier without some rational basis for doing so. It is apparent from this holding of the court that there is no constitutional infirmity in a statute that applies equally to all members of a recognized class, i.e., the retail liquor vendors in the instant case.

The Florida statutes under attack in the present case were held constitutional by the Florida Supreme Court in the case of **Pickerill v. Schott,** Fla. 1951, 55 So.2d 716, and in a Florida Appellate decision of **Overstreet v. Lee,** 1st D.C.A. 1963, 152 So.2d 201. Other states have upheld the constitutionality of similar legislation. **Tom and Jerry Inc. v. Nebraska Liquor Control Commission,** Neb. 1968, 183 Neb. 410, 160 N.W.2d 232; **Fowler v. Harris,** Md.App. 1938, 200 A. 825 and cases cited therein.

Where the issue of the constitutionality of a state statute has been squarely heard and determined by the courts of that state, it is appropriate for this Court to affirm. **Arizona Publishing Co. v. O'Neil, et al.,** 22 F.Supp. 117 (D.C. Ariz. 1938) aff'd 304 U.S. 543, 82 L.Ed. 1518, 58 S.Ct. 950. More particularly, Mayhue's position that it has asserted a substantial federal question is itself so unsubstantial as not to require further argument.

CONCLUSION

For the foregoing reasons the Motion to Dismiss the Appeal, or in the alternative the Motion to Affirm the Order of Dismissal should be granted.

Respectfully submitted,

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Attorney for Florida State Beverage Department
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Tallahassee, Florida

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Assistant Attorney General
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